IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 19, 2006 Session

STATE OF TENNESSEE v. JACKIE LEE HOLLIMAN

Appeal from the Criminal Court for Davidson County
No. 2000-A-557 Steve Dozier, Judge

No. M2005-02139-CCA-R3-CD - Filed February 5, 2007

The defendant, Jackie Lee Holliman, pleaded guilty in Davidson County Criminal Court to two counts of attempted aggravated sexual battery. He agreed to two concurrent eight-year terms, suspended with eight years' probation. Violation of probation warrants were served, resulting in the trial court revoking the defendant's probation. The defendant appeals the revocation, and we affirm the trial court's order.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

John Herbison, Nashville, Tennessee, for the Appellant, Jackie Lee Holliman.

Robert E. Cooper, Jr., Attorney General & Reporter; Brent C. Cherry, Assistant Attorney General, Victor S. Johnson, III, District Attorney General; and Hugh Garrett, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Facing a 2000 indictment charging two counts of aggravated sexual battery and two counts of rape of a child, the defendant pleaded guilty to two counts of attempted aggravated sexual battery, and the trial court entered judgments on January 22, 2003, that imposed two concurrent eight-year sentences suspended on eight years' probation. The judgments contain as conditions of probation, stated merely as "sex offender treatment" and "sex offender registry."

On June 29, 2005, the State executed a probation violation warrant that alleged several violations:

> **Rule 6**: I will allow my Probation Officer to visit my home; employment site, or elsewhere, and will carry out all instructions he/she gives, and

report to my Probation Officer as instructed. **Violation**: Offender admits to traveling out of county without permission or following instructions. **Violation**: Offender admits to violating sex offender directive #6 regarding consumption of alcohol. **Violation**: Offender admits to violating sex offender directive #15b regarding having prolonged purposeful contact with minors without an approved chaperone. **Violation**: Offender admits to violating s.o. directive #15d regarding dating a woman with children. **Violation**: Offender admits to violating s.o. directive #21 regarding prohibited locations, amusement parks (state fair).

On July 14, 2005, the State executed an amended probation violation warrant, which alleged additional violations:

> **Rule 1**: I will obey the laws of the United States as well as any municipal ordinances. **Violation**: Offender has failed to observe T.C.A. 39-13-706 regarding sex offender treatment. **Rule 6**: I will allow my Probation Officer to visit my home; employment site, or elsewhere, and will carry out all instructions he/she gives, and report to my Probation Officer as instructed. **Violation**: Offender has facilitated third party contact to the victim by having someone threaten her. **Violation**: Offender has been discharged from officer instructed sex offender treatment. Rule 10: I will observe any special conditions imposed by the Court as listed below: Sex Offender Registry, Sex Offender Treatment. **Violation**: Offender has been discharged from court ordered sex offender treatment.

Although the trial court began the evidentiary hearing on July 14, 2005, the same day the amended warrant was executed, the defendant made no objection or claim of lack of notice in the proceeding on the warrant, as amended. The court reconvened the hearing on July 28, 2005. George Harrien with the State of Tennessee's Board of Probation and Parole, Sex Offender Unit testified that he began supervising the defendant on February 6, 2003. Mr. Harrien testified that, at first, the defendant was "belligerent" and "upset about being on probation, upset about the terms of probation, and things like that."

The defendant then became compliant until December 2004 when he started dating a woman, Tammy Music. Mr. Harrien learned that the defendant had been traveling to Rutherford County to visit Ms. Music. When he confronted the defendant, the defendant admitted to traveling out of the county to "pick up his son in Greenbrier, Tennessee." The defendant initially denied traveling to Rutherford county; however, later, he did admit to traveling to Ms. Music's house and spending the night. Mr. Harrien testified that Ms. Music had two minor children, Holly, age 14, and Jerry, age 17 or 18. Mr. Harrien testified that the defendant had been instructed not to "date, befriend, or unite with anyone who has children," and he testified that, after the defendant informed his treatment group in December of his relationship with Ms. Music, the defendant was instructed "to leave this woman alone." He also testified that, at one point, the defendant stated that he had stopped dating Ms. Music.

Mr. Harrien further testified that the defendant informed him that he had traveled to the State Fair with his son, Ms. Music's children, two other unidentified minor children, and his State-approved chaperone. Mr. Harrien stated that this was a "major violation on him" and that the defendant needed permission to do this, regardless of a chaperone.

Mr. Harrien also testified that the defendant, at first, denied drinking alcohol. Later, the defendant admitted visiting the Starlite Lounge "on occasion" and that "he might've sipped on something."

Mr. Harrien testified that he learned of these violations from a polygraph test administered on July 6, 2005.

On cross-examination, Mr. Harrien testified that, prior to December, the defendant had been progressing and was being honest. Mr. Harrien stated that the defendant "really made some attempt to change his life around. He got a better job; he started working, making more money; he started presenting himself better, cleaning himself up." Mr. Harrien testified that the defendant had never missed an appointment, and he had no reason to believe the defendant had committed "any sexual touching" during his two and one-half years of probation.

Mr. Harrien testified on cross-examination that he learned from the victim that the defendant had been violating his probation. The polygraph test was administered on July 6, and as a result, the defendant was honest about the violations. Mr. Harrien also testified that he learned the victim received a threatening telephone call regarding the defendant's incarceration due to probation violations. After this threatening telephone call, the defendant was discharged from his treatment program.

John Brogdon, the proprietor of Associates for Sexual Assault Prevention and leader of the defendant's treatment group, testified that the defendant officially started the program in March 2003. Mr. Brogdon testified that the group-treatment meets once a week at a minimum, depending on members' needs. He explained that the primary rule for treatment was to abide by the terms agreed to with the court and with the Board of Probation and Parole. As part of the treatment, the defendant had to participate in an in-take process and clinical polygraph tests.

Mr. Brogdon testified that the defendant started out "pretty bad" in treatment. He initially denied guilt, which was not an uncommon reaction. After finally admitting culpability, the defendant minimized and rationalized his conduct, and at one point, he referred to the victim as a "tramp." Mr. Brogdon testified that, although the defendant received treatment for approximately one and one-half years, he failed to reach the next stage, "Victim Empathy." Mr. Brogdon did not articulate what the duration of the program was to be or whether the defendant was on pace after one and one-half years. However, Mr. Brogdon testified that the defendant's presence in the initial stage of development was a concern to him.

Mr. Brogdon testified that prior to December 2004 the defendant was making progress on being honest. In December, the defendant admitted to the treatment group that he had been dating a woman with children, and Mr. Brogdon advised the defendant that this was a violation of probation. The defendant affirmed that he had ceased dating the woman. Mr. Brogdon further testified that in May or June 2005 he learned from Mr. Harrien that the defendant had neither ceased dating Ms. Music nor stopped having contact with children. Mr. Brogdon opined that, from January through May 2005, the defendant lied to the treatment group about Ms. Music. Mr. Brogdon testified that, when he confronted the defendant, he admitted to the relationship and stated that Ms. Music "got rid of her kid." Mr. Brogdon further testified that the defendant's persistence in pursuing Ms. Music "would have an impact on the victim, who generously gave him the break of his life, to get eight years of probation . . . hoping that he would change his life."

Mr. Brogdon testified that the defendant had been terminated from the treatment program, although he was not terminated until the day before, or the day of, the July 14 hearing. Mr. Brogdon had initially told the defendant that he would "hold [the issue of dating Ms. Music] in abeyance, [until] the Court hears it and makes [its] decision." After speaking with the victim on the night of July 13, however, he became concerned "that her safety be enhanced [more] than [the defendant's] comfort." He further testified that he was concerned that the defendant had lied to his son, the victim's half-brother, and the son was "turning on his sister." Mr. Brogdon testified that "the net result of these violations . . . is that this victim, who was raped and threatened with her life, as she told, is now suffering for that." Apparently, this information was not garnered by Mr. Brogdon until he spoke with the victim on July 13, 2005. He then prompted the July 14 amendment of the probation report to include non-compliance with the requirement of treatment.

Mr. Brogdon testified that the defendant should have to sit down with his son, in the presence of reliable witnesses, and tell him the truth so the victim will not suffer as a result of the son's and other family members' behavior.

Mr. Brogdon further testified that his treatment would not help the defendant "without considerable change, on [the defendant's] desire to abide by . . . fundamental issues of keeping [his] word that [he gave] to the Court, keeping [his] word that [he gave] the Board of Probation and Parole, keeping the word that [he gave] to [his] treatment group."

Mr. Brogdon opined that in cases in which a sex-abuse victim acquiesces in a beneficent sentence for the offender, "she feels that she's been slapped in the face yet again" when the offender fails to take the "opportunity and change." He testified that the defendant in the present case had "brought upon the victim disgrace, orchestrate[d] people to think she's lying, orchestrate[d] people to diminish her, and use[d] other key people in her life to split up families."

Mr. Brogdon testified that the "Victim Empathy" stage of the program is a requirement to completing the program. He offered that the treatment of the victim made him "wonder whether . . . [the defendant] would just be mouthing words" if he were allowed to enter the victim empathy stage. He opined that a key to preventing sexual offenders' re-offending is in their

deciding that "they don't wanna [sic] hurt anybody anymore;" those who "minimize" or "rationalize" have failed to accept this value. Still, Mr. Brogdon did not rule out the possibility of trying to maintain the defendant in the treatment program if the court decided to leave him on probation. "He is not one of those deep-end pedophiles," he added.

The victim, T.F.,[1] testified that she agreed to the defendant pleading guilty and receiving probation. She testified that she hoped the defendant would "become a productive member of society, to not only benefit himself but [her] brother." However, in her opinion, the defendant had not done so.

The victim testified that on Tuesday, July 12, 2005, she received a telephone call on her cellular telephone from an unidentified female who said, "You better hope' – 'You' – 'You better hope he doesn't go to jail, you f-ing B.'" The victim testified that she was unaware the defendant was in jail at the time of the call. The victim learned the defendant was in jail on Wednesday morning, and on Wednesday night, she received another telephone call stating the same content.

The victim further testified that, prior to Wednesday, July 13, 2005, she and her brother had a "very good" relationship. Her brother would call her cellular telephone, and they would talk. On Wednesday, she received a telephone call from her brother, and he stated, "Well, how did you like your phone call last night?" The victim testified that she does not feel safe as a result of the telephone calls.

On cross-examination, the victim testified that both telephone calls were from the same female while the defendant was in jail and that she had neither met Ms. Music nor would recognize her voice. The victim also testified that her brother did not mention the defendant's involvement in the telephone calls.

The victim testified also on cross-examination that she learned from family members that the defendant had been staying at his girlfriend's house out of county, drinking alcohol, and being around his son and his girlfriend's children without a chaperone. She waited one month and then contacted the defendant's probation officer.

When questioned by the court, the victim testified that her brother has her cellular telephone number and that Ms. Music could have received the number from her brother.

Jackie Lee Holliman, Jr., the defendant's 15-year-old son, testified on his behalf. He stated that he and the victim share the same mother and that he lives with his great uncle in Greenbrier, Tennessee. He testified that he stopped living with his father after he pleaded guilty and that his father told him what he had done to his sister prior to pleading guilty. He said that the defendant told him that he touched her "privates" with his finger and that "he didn't force it upon

[1] It is the policy of this court to refer to victims of sexual battery by their initials.

her." Mr. Holliman also testified that, in his opinion, "there is another side to [the] story" and that it only happened when his sister was a teenager.

Mr. Holliman testified that his father visited him every other weekend with his aunt Erlene as the chaperone. On one occasion, he went with this father, Erlene, and Ms. Music's children to the State Fair and that Erlene was present the entire time. He also testified that his main support comes from his father and Ms. Music and that his father has come out of county to visit him without a chaperone, for example, to give him lunch money.

Mr. Holliman testified that he learned that his father had been arrested for violating his probation when Ms. Music called him and said "that somebody had called in and said something to [the defendant's] probation officer." He testified that he did not learn that it was the victim who had called the probation officer until the victim herself called him and told him several days after the arrest. Mr. Holliman stated that he was angry at that point and called her a "bitch" because he felt betrayed. He denied discussing any telephone calls that she had received, and he stated that he did not tell Ms. Music or anyone else the victim's cellular telephone number.

Tammy Music, the defendant's girlfriend, testified that she met the defendant in late August 2004 and that, within the first week of their relationship, he told her about his guilty plea and probation, including the condition that he could not be around children.

Ms. Music also testified that, before she met the defendant, she was having trouble with her daughter. She called her ex-husband and asked "[I]f he would take power of attorney over her because she was just so out of control that I couldn't handle her." Therefore, in December, her daughter went to live with her ex-husband, not the girl's natural father. She testified that her ex-husband is in the process of adopting her, and Ms. Music stated that she would follow through with the adoption regardless of the defendant's conditions of probation.

Ms. Music testified that she lives in Rutherford county and that the defendant visited her house twice, once on Christmas Eve to exchange gifts with her and her children and on one other occasion. She testified that she never took her daughter to the defendant's house.

Ms. Music testified that she had a good relationship with the defendant's son and that she entertained the idea of becoming a State-approved chaperone. However, the defendant was told that it would be a waste of her time because she had a minor child.

Ms. Music testified that she has not known the defendant to drink any alcohol during the course of their relationship, and she admitted that she went to the State Fair with the defendant and the children but explained that Erlene, the chaperone, was there. In addition, Ms. Music denied contacting the victim after the defendant's arrest.

The defendant testified in his own behalf and stated that he had been on probation since February 22, 2003. He testified that he knew that he is not supposed to consume alcohol, leave the county without permission, or see his son without a chaperone.

The defendant admitted that he consumed alcohol accidentally at his job and that he reported this to his probation officer, but he denied drinking at the Starlite Lounge. He also admitted to leaving the county without permission approximately five or six times and admitted that he lied to Mr. Harrien and his treatment group regarding this. Furthermore, the defendant admitted visiting his son without a chaperone present.

Regarding his relationship with Ms. Music, the defendant testified that he informed his treatment group in December and that Mr. Brogdon told him "that it wasn't a very good thing for [him] to do" and that "it's in the directives." The defendant explained that Mr. Brogdon never told him not to date women with minor children.

The defendant also testified that he never told Mr. Harrien that he spent the night with Ms. Music, and he further testified that he lied about leaving the county and lied about seeing his son without a chaperone after he was informed that Ms. Music probably could not become a State-approved chaperone. He testified that he has legal custody of his son and had taken initial steps to have the court approve him seeing his son without a chaperone, but a lawyer from the Public Defender's Office never returned his telephone call.

The defendant told the court that he molested his step-daughter by digitally penetrating her, the first time, in a closet. He digitally penetrated her again at her grandmother's house, and he testified that he also performed oral sex on her. On one occasion, while the victim sat on the bathroom sink, he put on a condom, "[he] raised her up and [she] said, 'No, Jack, no.' And, [he] stopped." The defendant further testified that he did not remember rubbing her through her underwear when she was 9 or 10 years old.

The defendant testified that he was honest with his son about what he had done and that his son did not get the idea that there were two sides to the story from him. He admitted that he started lying to his treatment group in December because he was "selfish" and wanted to see his son and Ms. Music.

On cross-examination, the defendant claimed that, at first, he was not aware that he could not date a woman who had children. He stated that he was in contact with Ms. Music's daughter twice when Ms. Music was present and once at the State Fair when the chaperone was present. The defendant further testified that he was not honest from December 2004 to July 2005 and decided to tell the truth because of the violation reports to Mr. Harrien.

The defendant then recalled Mr. Harrien and Mr. Brogdon as witnesses, and they in essence reiterated their previous testimony.

The court revoked the defendant's probation via a written order filed August 15, 2005. The court found that the threatening telephone calls received by the victim occurred and were made by someone associated with the defendant. The court found that the defendant's attitude fueled his family's and friends' dislike towards the victim. The court opined "that the defendant did violate the terms of his probation by not complying with and completing the sex offender treatment program;" therefore, it ordered the defendant to serve his eight-year sentence in the Department of Correction. The court based its decision "primarily upon the nature of the offenses and a *conscious and wilful* failure to comply with and complete the sex offender treatment and for violating numerous sex offender directives."

On appeal, the defendant challenges the trial court's revocation of his probation on the grounds that the State failed to show that the defendant's conduct constituted a violation of court ordered conditions of probation and that the record actually shows that the defendant complied with court ordered conditions of probation.

The standard of review upon appeal of an order revoking probation is the abuse of discretion standard. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). For an abuse of discretion to occur, the reviewing court must find that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the terms of probation has occurred. *Id*.; *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). The trial court is required only to find that the violation of probation occurred by a preponderance of the evidence. T.C.A. § 40-35-311(e) (2006). Upon finding a violation, the trial court is vested with the statutory authority to "revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered." *Id*. Furthermore, when probation is revoked, "the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension." *Id*. § 40-35-310. The trial judge retains the discretionary authority to order the defendant to serve the original sentence. *See State v. Duke*, 902 S.W.2d 424, 427 (Tenn. Crim. App. 1995).

Effective in 1996, the legislature enacted the "Tennessee Standardized Treatment Program for Sex Offenders" (TSTPSO) and established the sex offender treatment board, which was charged with the responsibility of developing "guidelines and standards for a system of programs for the treatment of sex offenders which can be utilized by offenders who are placed on probation." T.C.A. § 39-13-704(d)(2) (2006). If a defendant who is accused of committing one or more specified sex offenses seeks probation or other form of alternative sentence, the trial court must obtain an evaluation of the defendant. *Id*. § 39-13-705(a). "If the court grants probation or alternative sentencing, any plan of treatment recommended by such evaluation shall be a condition of the probation or alternative sentencing." *Id*. § 39-13-705(b). The treatment described in Code section 39-13-705(b) is part of a standardized program in Tennessee to evaluate, identify, treat, and monitor sex offenders. *Id*. §§ 39-13-701, -702 (2006).

The defendant first argues that the court revoked probation because he "allegedly ran afoul of post-judgment directives or ostensible restrictions upon the Defendant's dating and

parenting behavior." The defendant argues that the court did not order specific conditions of probation other than "sex offender treatment" and "sex offender registry" listed as conditions on the judgment forms. He contends Mr. Harrien and Mr. Brogdon have "gratuitously transgressed the constitutional separation of powers, [and] they have purported to modify the conditions of [the defendant's] probation in a manner which would be unavailable to the trial court."

At the outset of our analysis, we acknowledge reservations about three components of the State's revocation complaints. First, other than the provisions of the conviction judgments and probation-rule language cited in the revocation warrant affidavits, the record on appeal contains no exposition or enumeration of the conditions of probation. On March 29, 2006, the defendant moved this court to order the clerk of the trial court to supplement the appellate record with the trial court's order specifying the conditions of the defendant's probation. This court ordered the supplementation on April 11, 2006. On May 15, 2006, the trial court clerk filed with the appellate court an affidavit stating that, upon completing a review of the trial court's records, the trial court clerk determined "that all documents pertaining to the Defendant's probation have been sent up with the Appellate Record." Thus, despite that Tennessee Code Annotated section 40-35-303(d) requires *the trial court* to "specify the terms of the [probation] supervision," that court apparently did not do so, other than to provide in its judgments that the defendant must undergo sexual offender treatment and comply with sexual offender registration. We conclude that these requirements comprise the only specified probation conditions of record. We recognize that a court may generally specify that a probationer shall comply with his supervising officer's reasonable instructions and that in the present case the affidavits and testimony reveal Mr. Harrien's instructions, but the record in the present case fails to establish a general, court-ordered, threshold requirement of compliance with the officer's reasonable instructions.

Second, even if violating the officer's instructions does avail the State of a basis for revocation, one of the critical terms of the instruction about the defendant's contact with minors was largely ignored. Specifically, the revocation warrant affidavit states that "directive #15d" prohibits the defendant's "*prolonged* purposeful contact with minors without an approved chaperone." (Emphasis added.) The record is equivocal about whether the defendant's contact with Ms. Music's daughter, in particular, was prolonged. Moreover, the trial judge did not make any findings about the frequency or duration of the defendant's contact with minors.

Third, we are unpersuaded that the State established by a preponderance of the evidence that the defendant was responsible for threatening telephone calls made to the victim.

The bottom line is that we will analyze the propriety of revocation on the single ground of whether the defendant violated the requirement – mandated by the judgments and by statute – that he obtain sexual offender treatment. *See, e.g.*, *State v. James Edward Long*, No. M2004-03042-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Nashville, Nov. 15, 2005) (stating that the presence of a single ground for probation revocation is sufficient).

Tennessee Code Annotated section 39-13-705(b) specifically states that "any plan of treatment recommended by [the defendant's evaluation][2] . . . *shall* be a condition of the probation." *See* T.C.A. § 39-13-705(b) (emphasis added). The judgments list "sex offender treatment" as a condition to the defendant's probation. The trial court found that the defendant violated directives of his treatment program. We find that the record supports this finding and hold that the trial court did not abuse its discretion in revoking the defendant's probation.

The defendant claims that he complied with all court-ordered conditions of probation, satisfying the *State v. William A. Marshall* standard. *See State v. William A. Marshall*, No. M2001-02954-CCA-R3-CD, slip op. at 8-10 (Tenn. Crim. App., Nashville, Oct. 14, 2002). Similar to the defendant in *William A. Marshall*, the present defendant had not missed a treatment session or payment. However, unlike Marshall, who had completed all of his assignments in all ten modules of the program, the present defendant was only in the first stage of treatment before he was removed from the program. There is no evidence contained in the record that the defendant had completed any objective portion of his treatment program. Moreover, he was dismissed from the treatment program for cause, and the record supports the trial court's reliance upon the defendant's blameworthy failure at treatment as a basis for revocation. *See State v. Joe Shelton Berry*, No. M2004-03052-CCA-R3-CD, slip op. at 3- 4 (Tenn. Crim. App., Nashville, Sept. 27, 2005, *perm. app. denied* (Tenn. 2006) (distinguishing *William A. Marshall* and commenting that Berry "violated his probation when he was discharged from the sex offender treatment class, for ongoing deceptive activity, whereby he could not complete the treatment program or be assessed for future risk" and holding that Berry "violated his probation when he was discharged from the sex offender treatment program"). Therefore, we hold that the record supports the trial court's conclusion that the defendant did not comply with the court-ordered conditions of probation.

Considering the above analysis, we affirm the judgments of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE

[2]The record neither contains a copy of this evaluation nor a copy of the presentence report with the evaluation attached.